KEVIN M. SALI, OSB No. 044065
kevin@salilaw.com
Kevin Sali LLC
1500 S.W. First Ave., Suite 1020
Portland, Oregon 97214
Telephone: (503) 329-3598
Facsimile: (503) 765-5377

Attorney for Defendant Jeffrey Stover

JOHN HENRY HINGSON III, OSB No. 710821
johnh@hingson.com
John Henry Hingson III P.C.
409 Center Street
P.O. Box 1448
Oregon City, Oregon 97045
Telephone: (503) 656-0355
Facsimile: (503) 656-0415

Attorney for Catherine Stover

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RONALD EUGENE STOVER and JEFFREY CHARLES DANIEL STOVER, Defendants.	Case No. 3:16-cr-00253-AA REPLY IN SUPPORT OF MOTION FOR RETURN OF PROPERTY By Jeffrey Stover and Catherine Stover Request for Oral Argument

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTS 2

A. 2011-2012: Option Agreement and Two Challenged Reinstatement Payments 3

B. 2013: Catherine Stover's Purchase of the Home 4

III. LEGAL ISSUES 8

A. The Government's Sole Basis for Retaining the Funds Depends on Their Being Jeffrey Stover's Property. 8

1. Possible Theory 1: The E-Trade Funds Belonged to Jeffrey Stover. 9

2. Possible Theory 2: The Wilsonville Home Belonged to Jeffrey Stover. 10

3. Possible Theory 3: The Funds the Government Seized Were Actually the Contested Reinstatement Payments Themselves. 12

B. If Catherine Stover Needed to Rely on the § 853(n) Defense, That Defense Would Be Clearly Established Based on the Evidence Already Before This Court. 14

C. The Government's Reliance on Collateral Facts and Theories Is Without Merit. 16

D. The Warrant Cannot Support Either the Initial Seizure of Funds or the Government's Continued Possession of Them. 20

1. Neither the Supposed Validity of the Warrant, Nor the Existence of Probable Cause at the Time of Its Execution, Would Justify the Government's Continued Possession of Ms. Stover's Funds. 20

2. The Seizure Warrant Was Not, in Any Event, Valid. 22

IV. PROCEDURAL ISSUES 31

A. Under the Established Law of This Circuit, Catherine Stover Has a Due Process Right to a Hearing at This Time.. 32

B. The Government's Attempted Reliance on United States v. Lazarenko Is Unavailing. 34

C. This Case Is Squarely Governed by Crozier. 37

D. The Government's Other Attempts to Distinguish Crozier Are Similarly Without Merit. 40

1. The Distinction Between a Restraining Order and a Seizure Warrant Is Legally Irrelevant for Purposes of This Motion. 40

2. There Is No Need for the Government's Proposed Rebalancing (Which Would, in Any Case, Favor Ms. Stover). 41

E. This Court Need Not Consider, at This Time, the Special Issues Associated with Mr. Stover's Sixth Amendment Rights 44

V. CONCLUSION 45

TABLE OF AUTHORITIES

Cases
Barker v. Wingo, 407 U.S. 514 (1992) 39
Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) 41
Franks v. Delaware, 438 U.S. 154 (1978) 30
Obergefell v. Hodges, 135 S. Ct. 2584 (2015) 36
Pacheco v. Serendensky, 393 F.3d 348 (2d Cir. 2004) 8
Roberts v. United States, 141 F.3d 1468 (11th Cir. 1998) 22
United States v. Crozier, 777 F.2d 1376 (9th Cir. 1985) .... passim
United States v. Kaley, 134 S. Ct. 1090 (2014) 21, 45
United States v. Lazarenko, 476 F.3d 642 (9th Cir. 2006) .... passim
United States v. Pole No. 3172, Hopkington, 852 F.2d 636 (1st Cir. 1988) 13, 14
United States v. Roth, 912 F.2d 1131 (9th Cir. 1990) 34
United States v. Stanert, 762 F.2d 775 (9th Cir. 1985) 31
United States v. Wommer, No. 2:10–cr–00596–GMN–GWF, 2011 WL 5117874 (D. Nev. Oct. 27, 2011) 21

Statutes
18 U.S.C. § 982 .... 9, 10, 24
21 U.S.C. § 853 .... passim

Treatises
Dee R. Edgeworth, *Asset Forfeiture: Practice and Procedure in State and Federal Courts* (3d ed. 2014) 9

I. INTRODUCTION

The Government's Response makes one thing absolutely clear. On the merits, the Government has no valid claim to the hundreds of thousands of dollars it seized from Catherine Stover. The Government concedes that it is advancing only one purported theory, criminal forfeiture, to justify its possession of those funds. And it is now clear beyond any dispute that the facts of this case—even accepting all of the Government's factual contentions as true, and giving the Government the benefit of all conceivable inferences—cannot support the Government's seizure or retention of the funds on a criminal forfeiture theory. Accordingly, those funds are rightfully Ms. Stover's, and no matter what else happens in this case it is only a matter of time before that inevitable determination is made.

That "matter of time" is the Government's last remaining hope as it seeks to retain possession of Ms. Stover's funds. The Government uses much of its brief contending that this Court cannot consider this issue at this time. Ms. Stover, the Government argues, must sit back and watch passively as the Government prosecutes her husband for serious federal offenses; she must be deprived of the ability to use her assets to pay for his counsel of choice and fund a meaningful defense. Only after her husband has concluded his battle, against the full weight of the Government and its resources, will Ms. Stover regain her assets through this Court's eventual substantive decision.

But that is not the law. As set forth in the Stovers' Motion, the Ninth Circuit has unambiguously held that under circumstances such as those present here the property owner has a due process right to a prompt hearing on the question of the Government's continued right to retention. The key case—*United States v. Crozier*—is squarely on point, and indeed the facts here are more compelling than those in *Crozier*. The supposedly contrary case relied upon by the Government arose out of a completely different procedural and factual posture, and cannot support the Government's attempt to evade *Crozier*'s clear mandate. Under the law, Ms. Stover has a right to a hearing at this time.

The remainder of this Reply proceeds as follows:

- A factual section, which demonstrates that the Government's characterization of the events relating to this Motion is clearly erroneous;
- A legal analysis section demonstrating why, under any conceivable interpretation of the evidence in this case, the Government's retention of Ms. Stover's funds lacks any legal basis; and
- A procedural discussion setting forth why Ms. Stover has a firmly established right to a hearing at this time.

II. FACTS[1]

The Government, in its Response, describes a 2011 transaction in which Jeffrey Stover purchased an option to buy the Wilsonville home from Ron and Carol Abney. The Government's theory appears to be that the 2013 sale of the home to Catherine Stover—although involving a different set of parties, documents, and transactional terms—was actually a *de facto* consummation of the transaction contemplated back in 2011.

This is completely and fundamentally wrong, as demonstrated clearly by indisputable documentary evidence. As discussed below, the 2013 sale of the home to Catherine Stover was factually and legally distinct from whatever had been contemplated back in 2011, and the

[1] Most of the factual assertions in the Motion and in this Reply are supported by documentary evidence in the record. To the extent any such assertions are not established by such evidence, they will be established by evidence to be developed at the hearing.

eventual transaction was negotiated and executed with no relationship to the challenged 2011 and 2012 reinstatement payments.

A. 2011-2012: Option Agreement and Two Challenged Reinstatement Payments

As of 2011, the Abneys were well into default and foreclosure was looming.[2] Along with this financial situation, Ron Abney was undertaking business operations that would require his relocation out of Oregon. Jeffrey Stover understood this, and was considering purchasing the home to live in with his family, including Catherine. The parties considered various ways to make this transaction a possibility.

At one point, on or about July 1, 2011, Jeffrey Stover and the Abneys executed an option agreement that purported to give Jeffrey a one-year option to purchase the home for $1,435,000, in exchange for an option payment of $125,000 (which would be credited against the purchase price at the time of sale).[3]

As the Government acknowledges, this option payment was never made. The Government appears to contend that the two challenged reinstatement payments—in 2011 and 2012—were in effect substitute payments "to serve the same purpose of maintaining the house's availability for J[effrey] STOVER to purchase."[4]

The Government cites no evidence for this theory. Special Agent Abraham Smith says only that he "knows," from "discussions" with Ron Abney, that this is what happened.[5] We are not told what Abney actually said, or anything else other than the conclusion SA Smith claims to have drawn.

---

[2] *See* Decl. of Catherine Stover in Supp. of Jeffrey Stover's and Catherine Stover's Mot. For Return of Property ("C. Stover Decl."), Ex. 6 at 10, ¶¶ 30; Decl. of Kevin Sali in Supp. of Jeffrey Stover's and Catherine Stover's Mot. for Return of Property ("Sali Decl."), Ex. 1.

[3] *See* United States' Resp. in Opp. to Catherine Stover's Mot. to Intervene and Jeffrey Stover and Catherine Stover's Mot. for Return of Property ("Resp."), Ex. 2.

[4] Resp., Ex. 1 at 2, ¶ 8.

[5] *Id.*

Regardless, this Court need not decide whether to credit SA Smith's unsupported conclusion. Even assuming that the payments were made with that purpose, the ensuing sequence of events, as set forth below, completely severed any legally relevant link that may have existed between those payments and Catherine Stover's eventual purchase of the Wilsonville home.

B. 2013: Catherine Stover's Purchase of the Home

Assuming Jeffrey Stover's option ever became effective, it would have expired by its own express terms no later than July 31, 2012.[6] Accordingly, at least by that date, Jeffrey Stover had no right or interest related to the Wilsonville home. Any value he supposedly got through the 2011 reinstatement payment—even crediting the Government's theory that that payment was somehow a substitute for the $125,000 option payment—was gone. Jeffrey never executed any other option agreement, or any other document giving him an interest in the property. Accordingly, at least from July 31, 2012 on, Jeffrey had no interest in the property at all, and no preferential ability to purchase it beyond what any other potential purchaser had. (The Stovers were living in the Wilsonville home at this time, but nothing about that situation gave them any ownership interest in the home.)

Still, the Government appears to contend, even if Jeffrey lacked any actual interest in the property, those payments were connected to the ultimate 2013 purchase of the home because Abney could have accounted for the prior reinstatement payments in setting the purchase price. In the Government's view, "[t]he criminal proceeds used for mortgage rescue payments essentially served as prepayments, and that benefit transferred to Catherine without her providing any value for it."[7] Is this true?

---

[6] Resp., Ex. 2 at 1.

No—because by the time the 2013 purchase took place: (a) Abney was no longer in any sort of decision-making position with respect to the home; and (b) the transaction was negotiated by others who did not, and could not have, accounted for those prior payments in setting a price.

In early 2013—long after the second and last challenged reinstatement payment—Abney was again (or still) in default.[8] Homestreet Bank, the primary lender, instituted judicial forfeiture proceedings.[9] In the course of these proceedings, the Abneys ended up agreeing not to contest foreclosure and agreeing to give up, to Homestreet, any rights or interests they had in the property.[10]

The evidence demonstrates that from an early point in this process—long before the home was sold or the terms agreed upon—Ron Abney had no say in whether the home was sold, to whom, or for what price. These decisions were controlled by Homestreet (and, to a lesser extent, by junior lienholder First Tennessee Bank).

The documentary record definitively proves this point. Throughout various parts of 2013, Jeffrey Stover was actively negotiating for the purchase of the house (first on his own behalf, and later on Catherine's) with Homestreet, not Ron Abney.[11] Both parties aggressively negotiated as to price.[12] The documents make clear that: (a) Homestreet was trying to get the

[7] Resp. at 21.

[8] *See* Sali Decl., Ex. 2.

[9] *See id.*

[10] *See, e.g.*, Sali Decl., Ex. 3; *id.* Ex. 4.

[11] *See id.* Ex. 3; *id.* Ex. 5 at 17-35.

[12] *See id.* Ex. 3; *id.* Ex. 5 at 17-35.

highest net value it could for the property; and (b) if Homestreet had thought it could have extracted more value from a different buyer, either directly or through the auction process, it would have done so.[13]

The ultimate purchase price, approximately $1.1 million, was negotiated between Homestreet and Jeffrey Stover. Jeffrey was by this time acting on behalf of Catherine Stover, who, it had been determined, would the actual buyer. That price was clearly based on Homestreet's view that this was the best net value it could get for the property at that time.[14] The total purchase price Homestreet accepted was less than the outstanding principal balance on the loan. Accordingly, the loan transaction proceeded as a "short sale."[15]

At no time did either party reference the reinstatement payments in setting the purchase price—by, for example, suggesting that those payments should be credited towards that price, or that Catherine Stover should get some sort of discount or other preference because of those prior payments. It would have economically irrational for Homestreet to have considered those payments. Homestreet did not owe either of the Stovers anything because of those reinstatement payments, and those payments gave the Stovers no special rights or preferences with respect to the property. If, for example, Homestreet had thought that another party would be willing to pay $50,000 more for the property, it had every incentive to pursue that route. In short, as the documents prove beyond any serious dispute, this was a completely arm's-length negotiation and transaction with no legally relevant connection to the prior challenged payments.

---

[13] *See, e.g.*, *id.* Ex. 6.

[14] *See id.*

[15] *See id.* Ex. 5 at 10.

In fact, Homestreet representatives appear to have believed that it would have been illegal for them to deal with the Stovers on anything other than an arm's-length basis, in light of Fair Lending Act requirements mandating that transactions such as these proceed according to set, uniform policies. In the negotiations between Homestreet representative Adam Greenwood and Jeffrey Stover, Greenwood made it clear that Homestreet could not give the Stovers any preferential treatment.[16] Additionally, the final approval conditions required the Abneys to certify that the buyer was an unrelated party and that there were no side agreements in place.[17]

There was another significant reason why the transaction ended up being something completely different from what was initially contemplated—and, just as importantly, completely different than the way the Government characterizes it in its Response. Initial plans contemplated Jeffrey Stover either assuming the Abneys' debt or securing financing through some other source. But the loan-assumption plan was rejected by Homestreet,[18] and, as the Government acknowledges,[19] Jeffrey was unable to obtain alternative financing.

Catherine was able to secure financing—through her father, Peter Mellon—but the availability of this financing was contingent on Catherine being the sole buyer, owner and borrower.[20] (As noted in the Motion, this was for reasons having nothing to do with anything pertaining to this case.[21])

---

[16] *See, e.g. id.* Ex. 5 at 26-27, 31-32.

[17] *Id.* Ex. 5 at 10.

[18] *Id.* Ex. 5 at 31-32.

[19] *See* Resp. at 5.

[20] *See* Decl. of Peter Mellon in Supp. of Jeffrey Stover's and Catherine Stover's Mot. for Return of Property ("Mellon Decl."), ¶ 6.

[21] *See* Mot. at 5.

The Government treats this as a minor technicality, but it is anything but—particularly in light of the Government's apparent theory. Yes, the *initial* plan involved Jeffrey as a buyer—but, as with any transaction, the plan could only be consummated if sufficient cash or financing was available. As all parties agree, the Stovers did not have the necessary cash, and Jeffrey was unable to get financing. No financing meant no sale—which in turn meant that this plan was dead in the water, even if it had been the parties' original contemplation.

The Government strives, in its Response, to treat the 2013 sale to Catherine as a *de facto* sale to Jeffrey. But that is simply not what happened, as the documents make clear. The sale of the home was to Catherine—not to Jeffrey, and not to Jeffrey and Catherine together. It was the product of an arm's-length negotiation and transaction that had no legally relevant connection to the challenged reinstatement payments. The Government has produced no evidence to the contrary.

III. LEGAL ISSUES

A. The Government's Sole Basis for Retaining the Funds Depends on Their Being Jeffrey Stover's Property.

The Government has stated that the only theory it is advancing for the retention of the funds is criminal forfeiture. As all of the parties recognize, criminal forfeiture is only available against the property of the criminal defendant himself—in other words, in criminal forfeiture, "a criminal defendant can only be made to forfeit what was his in the first place."[22]

For criminal forfeiture, this requirement—that the subject property belong (or have belonged) to the defendant—is separate from, and additional to, the requirement that the property have a legally sufficient nexus to the offense.[23] Accordingly, criminal forfeiture cannot be used to seize the property of *another* person, regardless of any actual or alleged connection between that property and the offense.

---

[22] *Pacheco v. Serendensky*, 393 F.3d 348, 349 (2d Cir. 2004).

The sole exception to this rule is set forth in 21 U.S.C. § 853(c). Under that subsection, if certain property is criminally forfeitable in a defendant's hands, the transfer of that property to a different person does not defeat forfeitability unless the transferee meets the requirements of the "bona fide purchaser for value" rule.[24]

Nowhere in its Response does the Government lay out an actual theory as to how the seized E-Trade funds satisfy both of these requirements—that they belong (or belonged) to Jeffrey Stover, *and* that they had a legally sufficient nexus to the underlying alleged offenses. The Government's failure to offer such a theory, by itself, should be sufficient for the granting of this motion. Regardless, to demonstrate the complete lack of merit in the Government's purported case for forfeiture, counsel will set forth below the only possible theories the Government could conceivably be relying on for its retention of the E-Trade funds, along with explanations of why each theory is meritless.

1. Possible Theory 1: The E-Trade Funds Belonged to Jeffrey Stover.

The E-Trade funds could theoretically be forfeitable if they were in fact Jeffrey Stover's, assuming they had a legally sufficient nexus to the alleged criminal conduct.

---

[23] *See, e.g.*, 18 U.S.C. § 982(a)(1); Dee R. Edgeworth, *Asset Forfeiture: Practice and Procedure in State and Federal Courts* 199 (3d ed. 2014) (describing these as two separate requirements in the context of federal criminal forfeiture).

[24] *See* 21 U.S.C. § 853(c). This is the statute the Government cites for its contention that "the statutory scheme for the process of forfeiture specifically states that property titled in the names of third parties may still be forfeitable." *See* Resp. at 12 n.4.

The Government, however, does not even attempt to argue that those funds belonged to Jeffrey Stover. Nor could any such case be made. The E-Trade account was in Catherine's sole name, the Government itself consistently describes the funds as having belonged to Catherine,[25] and there is no evidence that they in fact belonged to Jeffrey (or to anyone else).

Nor is there any evidence that the funds *were* once Jeffrey's and were later transferred to Catherine, so 21 U.S.C. § 853(c) is not implicated.

Accordingly, the E-Trade funds cannot be criminally forfeitable on the basis that they ever belonged to Jeffrey Stover.

2. Possible Theory 2: The Wilsonville Home Belonged to Jeffrey Stover.

At various points, the Government seems to suggest that perhaps the Wilsonville home in fact belonged to Jeffrey, not Catherine.

As an initial matter, even if true this would be legally insufficient. For criminal forfeiture purposes, it would not be sufficient for the Government to show that the *home* was Jeffrey's. The traceability rules for criminal forfeiture purposes are different from those applicable in civil forfeiture. Depending on the offense at issue, criminal forfeiture can be available for property *of a defendant* if that property was connected to the offense in a legally sufficient way.[26] Criminal forfeiture may also be available for property *of a defendant* that is "traceable" to such property.[27] But criminal forfeiture cannot reach property of *another* person, even if that property is

---

[25] *See, e.g.* Resp. at 1, 6-7, 20, 24.

[26] *See, e.g.*, 21 U.S.C. § 982(a)(1) (referring to property "involved in" certain offenses); 21 U.S.C. § 982(a)(2) (referring to property "constituting, or derived from, proceeds" obtained through the offense).

[27] *See, e.g.*, 21 U.S.C. § 982(a)(1).

"traceable" to criminally forfeitable property.[28] Accordingly, because it was the E-Trade funds and not the home that was seized, the Government must show that those funds were Jeffrey's property (at least at some point), and it would be insufficient to show that he had owned the home.

But this Court need not rely on that legal distinction. Even if it were sufficient for the Government to show that the home was Jeffrey's property, the Government could not possibly make out such a case. The evidence as to the ownership of the Wilsonville home is as follows:

- Uncontradicted documentary evidence showing Catherine Stover as the sole purchaser on the Purchase and Sale Agreement.[29]
- Uncontradicted documentary evidence showing Catherine Stover as the sole owner listed on the deed.[30]
- Uncontradicted documentary evidence showing Catherine Stover as the sole buyer on the settlement statement.[31]
- Uncontradicted documentary evidence showing Catherine Stover as the sole obligor on the associated promissory note.[32]
- Uncontradicted documentary evidence showing Catherine Stover as the sole grantor on the Deed of Trust.[33]

---

[28] Again, subject to the exception in 21 U.S.C. § 853(c), discussed above, which can apply when property, already criminally forfeitable in a defendant's hands, is transferred to another person.

[29] C. Stover Decl., Ex. 1.

[30] *Id.* Ex. 2.

[31] *Id.* Ex. 3.

[32] *Id.* Ex. 4.

[33] *Id.* Ex. 5.

- Uncontradicted, sworn testimony from both Catherine Stover and Peter Mellon establishing that Catherine was the sole purchaser, owner, and (later) seller of the home, and that this was for entirely legitimate reasons.[34]

There can be no dispute that Catherine Stover was the owner of the Wilsonville home. Notably, this would be true even if every factual contention in the Government's Response and supporting evidence was correct—which, as detailed above, is not the case.

3. Possible Theory 3: The Funds the Government Seized Were Actually the Contested Reinstatement Payments Themselves.

At one point, the Government appears to suggest that what it actually did was seize the contested reinstatement payments themselves.[35] This is presumably on the theory that the reinstatement payments "went into" the Wilsonville home when those payments were made in 2011 and 2012; that they remained connected to the home, for forfeitability purposes, when Catherine Stover purchased the home in 2013; and that they passed into Ms. Stover's account as part of the proceeds of the 2016 sale.

This theory too is without merit. Again, to succeed as to criminal forfeiture, the Government must satisfy at least *two* requirements: (a) the property at issue belongs (or belonged) to the defendant, *and* (b) there is a legally sufficient nexus (incorporating, where appropriate, traceability principles) between the seized property and the alleged offense.[36] Here, the Government falls short on both fronts.

---

[34] *See* Mellon Decl.; C. Stover Decl.

[35] *See, e.g.*, Resp. at 20 ("Here, the United States' interest vested in the seized money when Ronald and Jeffrey Stover fraudulently received it from the investor victims in 2011 and 2012."); *id.* at 21 ("Catherine Stover is not a purchaser for value because she did not provide value for an interest in the money we seized. The criminal proceeds were paid to Homestreet Bank as rescue payments . . . .").

[36] *See supra* Part III.A.

As to the first of those requirements, the evidence in this case categorically disproves any suggestion that Jeffrey Stover—or, for that matter, Ronald Stover—ever *owned* the funds allegedly misappropriated from investors. The Government's allegations and evidence are that, at most, Ronald Stover (with Jeffrey Stover allegedly aiding and abetting him) solicited certain funds from investors for stated purposes, and directed those funds toward a different purpose—specifically, to make the reinstatement payments on Abney's Wilsonville home.[37] Even assuming the truth of those allegations, however, the funds were at no point Ronald Stover's, nor were they Jeffrey's.

And even if they had been—once again, it doesn't matter, because those are not the funds that the Government seized in this case. As discussed in the Motion, even under the generally broader traceability rules applicable in *civil* forfeiture cases, the contested funds used for the reinstatement payments never "became," "entered" or "tainted" the house.

That house had been bought previously, using funds unrelated to any alleged conduct in this case. Assuming the funds were used as the Government contends—to pay off the Abneys' accumulated debt to Homestreet—that use did not render the house itself forfeitable. Even where it is conceded that such post-purchase payments were made with tainted funds, courts have refused to hold "that forfeitability spreads like a disease from one infected mortgage payment to the entire interest in the property acquired prior to the payment."[38] The most that could possibly have been forfeitable under *any* theory would be any actual reduction in principal achieved due to the reinstatement payments.[39]

---

[37] *See* C. Stover Decl., Ex. 6 at 10-14.

[38] *United States v. Pole No. 3172, Hopkington*, 852 F.2d 636, 639-40 (1st Cir. 1988); *see also* Mot. at 12-13 (discussing the Ninth Circuit's endorsement of this analysis).

In short, the funds that were in Catherine Stover's E-Trade account in July of 2016 were not, under any valid legal analysis, the same funds that were allegedly associated with the contested reinstatement payments from 2011 and 2012. This means that they would not be criminally forfeitable even if they had at one point been the property of Jeffrey (or Ronald) Stover—which, once again, they never were.

B. If Catherine Stover Needed to Rely on the § 853(n) Defense, That Defense Would Be Clearly Established Based on the Evidence Already Before This Court.

The Government asserts that "[t]o be entitled to the return of the seized funds, Catherine Stover would have to prove that she either (A) has a superior right, title, or interest in the funds to the United States' interest or (B) is a bona fide purchase [*sic*] for value reasonably without cause to believe that the property would be subject to forfeiture."[40]

No. That is wrong. Those are defenses that come into play only *after* the Government has established that the property was forfeitable in the first instance.[41] And as set forth in the Stovers' Motion, there is no need for this Court to consider those defenses because the Government cannot possibly make out a *prima facie* forfeiture case.

---

[39] *See Hopkington*, 852 F.2d at 640 n.4; Mot. at 12. The Government has not identified any such principal reduction. Although this should not be the Stovers' burden, counsel respectfully notes that available documentation suggests that the 2011 reinstatement payment appears to have reduced the outstanding principal balance by $16,751.44, and the 2012 payment appears to have reduced that balance by $19,535.47. *See* Sali Decl., Ex. 7 at 9-14.

[40] Resp. at 20.

[41] *See* 21 U.S.C. § 853(n).

However, because the Government appears to contend that the defenses in that subsection would be unavailable to Ms. Stover, they are discussed here for the sake of completeness. The Government contends, for example, that "Catherine Stover is not a bona fide purchaser for value because she did not provide value for an interest in the money we seized."[42] But assuming the Government is referring to the funds associated with the initial reinstatement payments, that is not the relevant inquiry.

Under the statute, the focus is on the transaction through which the purchaser acquired the property interest she seeks to assert.[43] That transaction, for Catherine, was either the 2016 sale of the Wilsonville home—in which she "purchased" the sale proceeds in exchange for that home—or her 2013 purchase of that home from the Abneys.

For either transaction, the "bona fide purchaser for value" requirements are clearly met. As to the 2013 purchase, the Government's contrary view is based on a fundamental mischaracterization of that transaction, whose true character, as discussed *supra* at Part II.B, is clearly set forth in the documentary evidence. The extensive, aggressive negotiation history of that transaction demonstrates that each party was trying to get the best possible deal for itself. The fact that Jeffrey Stover handled the actual negotiations is legally irrelevant; as discussed *infra*, people negotiate transactions for others all the time, and this fact has no bearing on whether the buyer or seller "expect[s] that he or she will receive equivalent value in return."[44]

---

[42] Resp. at 21.

[43] *See* 21 U.S.C. § 853(n)(6)(B).

[44] Resp. at 21 (quoting *United States v. 1309 Fourth St., La Grande, Union Cty., Dist. of Or.*, No. 2:12-CV-02263-MA, 2015 WL 670572, at *8 (D. Or. Feb. 17, 2015)).

And the Government's contention that the 2013 transaction was somehow connected to the earlier negotiations and reinstatement payments—that "[t]he criminal proceeds used for mortgage rescue payments essentially served as prepayments, and that benefit transferred to Catherine without her providing any value for it"[45]—is flatly contradicted by all available evidence. As the documents make clear, and as will be demonstrated still further at the evidentiary hearing, the 2013 sale was negotiated with no connection whatsoever to the previous contested payments.[46]

Again, this Court need not even consider whether any statutory defense would be available, because the uncontradicted evidence clearly establishes that the Government cannot make out a prima facie forfeiture case. Regardless, if for some reason it was necessary to reach the issue of defenses, the evidentiary record does and will conclusively demonstrate that Catherine would have a clearly established defense and would defeat forfeiture on that basis as well.

C. The Government's Reliance on Collateral Facts and Theories Is Without Merit.

With incontrovertible evidence against it on the central question—who owned the home and the E-Trade funds—the Government bases much of its Response on a series of collateral facts that, it appears to contend, override the fact that Catherine Stover actually owned both. The Government emphasizes the following:

---

[45] Resp. at 21.

[46] *See supra* Part II.B.

1. That the transaction was similar to the earlier contemplated transaction, in which Jeffrey Stover would have ended up owning the home.

As discussed above, the Government significantly overstates the degree of continuity between the initial negotiations, during which time it was contemplated that Jeffrey Stover would end up owning (or co-owning) the home, and the eventual transaction with Catherine as the purchaser.

But even if the deal with Catherine had been a carbon copy of the initial one with Jeffrey, and had been negotiated with the Abneys—neither of which was the case—so what? The fact is that, whatever the initial plan may have been, Catherine Stover ended up as the sole owner and purchaser. Indeed, she *had to* be the sole owner and purchaser—that was a condition imposed by Peter Mellon, the only available source of the financing necessary to purchase the property.[47]

2. That Jeffrey Stover conducted the substantive negotiations, and Catherine Stover was not directly involved.

Again—so what? This is entirely irrelevant to the questions of who owned the home and who owned the E-Trade funds. People negotiate transactions on behalf other people all the time—lawyers and real estate agents for clients, family members for each other, good negotiators for bad, assertive people for their shy friends. When that happens, there is no legal principle giving the negotiator an ownership right in the property at issue. Accordingly, the question of who did the negotiating has no bearing on the ultimate ownership issue.

[47] *See supra* Part II.B; Mot. at 4-5.

3. That Catherine Stover did not have sufficient income or assets to buy the property herself.

It's true—she didn't. Neither did Jeffrey—who, the Government admits, was "unable to qualify for a bank loan to purchase the Wilsonville home," even with his greater individual earning capacity.[48] In fact, Peter Mellon, the only source available to finance the purchase, insisted that the loan transaction be solely in Catherine's name and that she be the home's sole owner.[49]

It is also immaterial if the funds to pay back the loan to Mr. Mellon were expected to, and did, come from Jeffrey Stover's income. This has no bearing whatsoever on the ownership issue. The Government does not contend that these installment payments allegedly provided by Jeffrey Stover were with tainted or forfeitable funds—and, of course, as discussed above, even if such funds *had* been tainted, their use to pay down the debt would not have rendered the house itself (or its eventual sale proceeds) forfeitable.[50]

Here, as shown by all available documents and as confirmed by uncontradicted sworn testimony, Catherine Stover was the owner of the home following the purchase. Nothing submitted by the Government changes that basic, dispositive fact.

4. That Jeffrey Stover would live in the home.

The Government's Response conflates two fundamentally distinct concepts—the *ownership* of the home, and the Stovers' *ability to live in* that home.[51]

---

[48] Resp., Ex. 1 at 2, ¶ 9.

[49] Mellon Decl. at ¶ 6.

[50] *See supra* Part III.A.3.

[51] *See, e.g.*, Resp. at 2 ("Jeffrey Stover . . . signed an Option to Purchase agreement with Abney to *live in* the Wilsonville home until the Stovers obtained financing to purchase the home from

There is no dispute that the Stovers did in fact live in the Wilsonville home prior to Catherine's purchase of the home in 2013. Assume for the moment that the Government's best-case scenario—that the challenged reinstatement payments allowed the Stovers, including Jeffrey, to do so, and to live there rent-free—is correct.

Yet again, it doesn't matter. For criminal forfeiture purposes, the only question is who owned the relevant property. Being allowed to live in a home, rent-free or otherwise, does not convey any ownership interest that is relevant to the forfeiture inquiry.

When the Abneys allowed the Stovers to live in the home, this did not pass title to either of the Stovers or have any other effect on the home's ownership. Similarly, after Catherine purchased the home in 2013, the fact that Jeffrey lived in the home with her had no effect on title or ownership. The Stovers' infant daughter, who also lived in the home, had no ownership interest in it. Had another relative, or a friend, been allowed to live in the home, the result would have been the same—that status would have conveyed no ownership interest.

There are some legal contexts in which the above facts—regarding who did the negotiating, who ultimately benefited from the transaction, who would live in the home, etc.—might be relevant. In determining whether the E-Trade funds are subject to criminal forfeiture, however, they are not. The funds were not and are not criminally forfeitable if the Government cannot establish the ownership and nexus requirements, and none of the collateral facts relied upon by the Government, even if accepted as true, would do so.

Abney."); *id.* at 24 (arguing that the reinstatement payments were used to "preserve the house's availability for the Stovers to *live in and* purchase") (emphasis added).

D. The Warrant Cannot Support Either the Initial Seizure of Funds or the Government's Continued Possession of Them.

The Government appears to contend that if the initial seizure warrant was valid, the Government can keep Ms. Stover's funds even if the evidence available now clearly establishes that the Government has no right to those funds. To the extent this is the Government's contention, it is unavailing on two separate grounds. First, in this context the probable cause inquiry is an ongoing one, and the relevant inquiry is based on the totality of the evidence known to this Court now, not only what was known at the time the warrant was issued. Second, the warrant itself is invalid and insufficient on multiple grounds.

1. Neither the Supposed Validity of the Warrant, Nor the Existence of Probable Cause at the Time of Its Execution, Would Justify the Government's Continued Possession of Ms. Stover's Funds.

The Government contends that the only information to be considered is that "contained within the affidavit and application,"[52] citing a case involving a challenged search. This is incorrect.

When a warrant-based search is challenged, the relevant question is whether the search, at the time, was lawful—a determination based on the information known to, or knowable by, the affiant and issuing magistrate at the time of application and issuance. Information and evidence arising after that time is generally not relevant; additional supporting evidence cannot save an otherwise invalid warrant, nor can new contrary evidence invalidate an otherwise valid one.

The reason for this is obvious. When a search is being challenged, the challenge involves whether the search itself was lawful at the time it was performed. Other than a challenge to the search itself, the challenger has no separate, independent right to prevent the Government from

[52] Resp. at 30.

using the discovered evidence. Even where additional evidence would have invalidated the search if known at the time, that does not make the search itself unlawful, because searches and warrants are evaluated based on the evidence at the time of warrant issuance. In other words, if the search was valid at the time, there is no ongoing violation and the challenger has nothing to complain of—even if, had additional evidence been available, the search could not have been validly conducted and the Government would not be able to use its fruits. Accordingly, if the search was lawful, there is generally no reason to consider additional, later-discovered evidence.

The situation is much different where, as here, the threatened interest is an ongoing possessory interest in the seized funds. Every day that the Government holds Catherine Stover's funds despite having no lawful right to them, Ms. Stover is deprived of substantial liberty and property interests. Even if the initial warrant provided an initial lawful basis for the seizure—which, as discussed below, it did not—if the evidence now before the Court establishes that the Government cannot meet its substantive burden as to forfeitability, the funds must be returned.

This is the case in the related context of a *Monsanto* hearing, in which a defendant has an opportunity to argue that his *own* funds, seized via warrant or restrained via order, must be released to him to enable him to fund his defense. In that situation, the inquiry is a present-tense one that does not focus on whether the warrant was valid at the time of issuance: "the government is required to show that there *is* probable cause to believe (a) that the defendant committed the crime that provides a basis for forfeiture, and (b) that the property specified as forfeitable in the indictment *is* properly forfeitable."[53] The same is true here.

---

[53] *United States v. Wommer*, No. 2:10–cr–00596–GMN–GWF, 2011 WL 5117874, at *4 (D. Nev. Oct. 27, 2011) (emphasis added); *see also United States v. Kaley*, 134 S. Ct. 1090, 1094-95 (2014) (similarly describing the inquiry in the present tense, without reference to the validity of the warrant or order at the time of issuance). *Kaley* clarified that in indicted cases, the

2. The Seizure Warrant Was Not, in Any Event, Valid.

In any event, for several reasons the seizure warrant was not, in fact, a valid one.

a. A Required Legal Element Is Entirely Absent from the Affidavit and Warrant.

As pointed out in the Motion, for a valid warrant to issue the Government had to establish, among other things, probable cause to believe "that an order under [21 U.S.C. § 853(e)(1)(B)(i)] may not be sufficient to assure the availability of the property by forfeiture."[54]

The Government admits that nothing in SA Smith's affidavit addresses this point. It suggests, however, that this aspect of the probable cause inquiry is established implicitly—because money is fungible and easy to transfer or spend, and the grand jury found probable cause to conclude that Ronald and Jeffrey Stover committed financial offenses in the past, so it is safe to assume that they would find some way to circumvent any order issued by this Court.

This suggestion is entirely without merit. The necessity requirement in § 853(f) is there for a reason. There is an explicit statutory presumption that the way to restrain assets prior to a trial is through the restraining order/injunction procedure set forth in § 853(e).[55] When that procedure is used, courts have interpreted the statutory text to allow a third-party claimant such as Ms. Stover a right to a post-restraint hearing, even without resort to constitutional claims such as those discussed *infra*.[56] Indeed, this very case demonstrates the soundness of this approach.

---

indictment meets the government's burden as to the first part of that inquiry, i.e., whether there is probable cause to believe that the defendant committed the charged crimes.

[54] 21 U.S.C. § 853(f); *see also* Mot. at 15-17.

[55] *See* 21 U.S.C. § 853(f).

[56] *See, e.g.*, *Roberts v. United States*, 141 F.3d 1468, 1471 n.6 (11th Cir. 1998) ("It seems clear that Congress meant to preserve the rights of all persons affected by protective orders—including third parties—to challenge those orders as they would any injunction, as long as no party asks the court 'to entertain challenges to the validity of the [underlying criminal] indictment.'") (quoting 1984 U.S.C.C.A.N. 3182, 3386 (alterations in original)).

Had the Government proceeded according to this presumptively appropriate path, Catherine Stover would have had an opportunity to point out the clear factual and legal errors in the Government's position at an early point in the proceedings.

The only time that procedure can be bypassed in favor of the warrant process—a process through which the Government seeks to deny the affected person *any* right to contest the seizure, or even point out obvious errors, until after the conclusion of all criminal proceedings—is when the Government can affirmatively demonstrate that the presumptive procedure "may not be sufficient to assure the availability of the property for forfeiture."[57]

This is a real, independent requirement, with real consequences to the persons whose assets are targeted for seizure. It cannot be met simply by saying, as the Government does here, that this is a financial case so somebody involved would probably disobey a court order. The Government's theory, if accepted, would read the necessity requirement entirely out of § 853(f), at least for financial offenses. If all the Government had to prove was that (a) money is fungible, and (b) someone associated with the money has been indicted for financial offenses, that requirement would be met in every white-collar case and there would be no need for the inquiry mandated by that subsection.

This cannot possibly have been Congress's intent. Congress knows how to incorporate presumptions into statutes, and has done so—selectively—in the forfeiture context. For example, 21 U.S.C. § 853, governing forfeiture in drug cases, includes a presumption that property acquired by a defendant during the course of criminal activity, with no likely source

[57] 21 U.S.C. § 853(f).

other than that activity, is forfeitable.[58] In incorporating this section into the separate provision governing forfeiture in financial and other non-drug cases, Congress specifically excluded that presumption.[59] With the level of care that it evidently used in deciding which presumptions are appropriate for which offenses, it is unlikely that Congress envisioned the Government's *de facto* "it's a financial offense so a protective order wouldn't have worked" presumption.

The error in the Government's analysis is particularly obvious given that the funds, at the time of seizure, were in an account in the sole name of *Catherine* Stover—a woman who not only has a spotless legal history, but who even under the Government's view was entirely uninvolved with anything relating to this case.

Again, it is worth spelling out what the default procedure—the procedure that, the Government contends, was demonstrated to be insufficient by the unstated implications in SA Smith's affidavit—would have been. That default procedure was for the Government to apply to this Court for an order restraining the funds. Then, if it had sustained its burden, this Court could have "entered a restraining order or injunction, require[d] the execution of a satisfactory performance bond, or take[n] any other action to preserve the availability" of the allegedly forfeitable funds.[60]

If such an order had been issued, it would clearly have "assure[d] the availability of the property for forfeiture" unless there was some substantial basis to believe that Catherine Stover would have disobeyed such an order. That possibility, on its face an extremely unlikely one, is still more so when the surrounding factual context is considered.

---

[58] 21 U.S.C. § 853(d).

[59] 18 U.S.C. § 982(8)(b).

[60] 21 U.S.C. § 853(e)(1).

The warrant was issued on July 12, 2016. This was several weeks after Catherine's husband Jeffrey had been arrested on the charges in this case.[61] The arrest, and this case, were prominently featured in the *Oregonian*.[62] Without question, Catherine Stover was aware by this time that her husband was under indictment and that the Government was keeping extremely close watch over everything relating to this case.

So the question, with regard to Catherine Stover—again, an innocent, uncharged woman with no history whatsoever of unlawful conduct—is this: What portion of SA Smith's affidavit establishes probable cause to believe that Ms. Stover would have defied an express order issued by this Court, with all the consequences that, she had to have known, would have flowed swiftly and certainly from such an act?[63]

If the answer is, as it must be, that there is no such portion—that nothing in SA Smith's affidavit even comes remotely close to meeting this significant and important burden—the warrant was and is invalid, even without considering the additional substantive flaws in the affidavit.

---

[61] *See* Dkt. No. 20 (arrest warrant, marked as having been returned on June 18, 2016).

[62] *See* Maxine Bernstein, *Oregon father and son scammed investors in business fraud conspiracy, indictment alleges*, *The Oregonian* (June 21, 2016), *available at* http://www.oregonlive.com/portland/index.ssf/2016/06/oregon_father_and_son_scammed.html.

[63] The Government cannot rely on any suspicion that *Jeffrey* Stover might have done something improper with the funds in the E-Trade account. For one thing, the affidavit, even considered in light of the grand jury indictment, sets forth nothing that would support the conclusion that Jeffrey might be inclined to disobey a direct order from this Court. More importantly, the affidavit does not set forth any facts that would support the conclusion that Jeffrey had access to the account.

b. Even on Its Face, the Affidavit Does Not Support the Substantive Forfeitability of the Seized Funds.

Additionally, for the warrant to be valid the supporting affidavit would have to establish a substantive case for forfeitability. It did not.

Because the Government is relying solely on a criminal forfeiture theory, the warrant could only support the seizure if the supporting affidavit set forth probable cause that the E-Trade funds were forfeitable through criminal forfeiture.[64] As discussed above, at a minimum that requires a legally sufficient ownership connection to Jeffrey Stover.

The Government did not make any such showing, and in fact did not even attempt to. The Government apparently proceeded on the theory that the funds would be forfeitable under some different theory—for example, the alleged connection to the contested reinstatement payments. As discussed above and in the Motion,[65] this is incorrect as a substantive legal matter. Accordingly, because the facts set forth in the supporting affidavit—even if taken at face value—at most support a legally invalid theory, the warrant was not valid.

The same result would follow if the Government attempted to rely on the warrant setting forth substantive grounds for civil forfeitability. As noted above, this theory should not be available to the Government, but even if it were it would be unavailing. As discussed above and in the Motion, the theory advanced by the Government would not support civil forfeitability of the entirety of the funds in Ms. Stover's E-Trade account. That theory could at most support forfeitability, through traceability principles, of an amount equal to the principal reduction achieved through the contested reinstatement payments. Again, therefore, the supporting affidavit at most sets forth a legally invalid theory even if the Government is allowed to rely on civil forfeitability for purposes of evaluating the warrant.[66]

---

[64] *See, e.g.*, 21 U.S.C. § 853(f) (". . . If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture . . . .").

[65] *See, e.g.*, Mot. at 11-13.

c. The Affidavit Contains Affirmative Misrepresentations and Misleading Omissions.

SA Smith's affidavit also contains material misleading omissions relating to the Government's central argument.

That argument, again, is that the 2013 sale of the Wilsonville home to Catherine Stover was in essence a consummation of the earlier negotiations between Jeffrey Stover and the Abneys, and that the terms of that ultimate transaction were influenced to Catherine Stover's benefit by the earlier reinstatement payments. The Government advances this position not only in the affidavit itself, but in its Response: arguing, for example, that "[t]he criminal proceeds used for mortgage rescue payments essentially served as prepayments, and that benefit transferred to Catherine without her providing any value for it."[67]

This is demonstrably incorrect. As discussed above, by the time of the 2013 sale, control over the Wilsonville home and any potential sale had been transferred to a party—Homestreet Bank—that had every incentive to, and did, negotiate at arm's length with Jeffrey and Catherine Stover, and that did not and could not have given any discount or credit based on the prior payments.

---

[66] Finally, even the analysis above assumes that the Government's submissions were sufficient to establish the facts it *did* attempt to establish. In fact, as noted in the Motion, not even that is true. As to certain critical points, the affidavit sets forth nothing more than unsupported, conclusory assertions. *See* Mot. at 16.

[67] Resp. at 21.

And SA Smith apparently knew of information and materials that clearly demonstrated these facts, yet did not present them to the issuing magistrate. The Government, and presumably SA Smith (who noted in his affidavit that his knowledge regarding the sale was based in part on discussions with agents assigned to this investigation), possessed and had reviewed emails, memoranda, and other materials obtained from Homestreet relating to Catherine Stover's purchase of the Wilsonville home. Specifically, on February 22, 2016, SA Sean Hamblet reviewed documents obtained from Homestreet pursuant to a grand jury subpoena. Based on this review, he noted (in a report which SA Smith presumably had access to) that:

- A final statement signed on 12/9/13 listed Catherine Stover as the borrower and Peter Mellon as the lender.[68]
- During the negotiation with Homestreet, "[Jeff] Stover [was] 'pushing back' and his father in law [did] not want to assume the loan for more than it is worth."[69]
- While Homestreet was seeking a $1.215 million purchase price, "Jeff Stover identifie[d] material issues and attempt[ed] to negotiate a purchase price of $1.1 million."[70]
- A letter from Homestreet to Ron and Carol Abney specifically stated that their deficiency would be waived only on the condition that ". . . The buyer should not be related to you and there shall be no other agreement, besides the Purchase and Sale Agreement, between you and the buyer . . ."[71]

---

[68] Sali Decl., Ex. 8 at 1; *id.* Ex 9 at 4-7.

[69] *Id.* Ex. 8 at 2; *id.* Ex. 5 at 35.

[70] *Id.* Ex. 8 at 1-2; *id.* Ex. 5 at 26-27.

[71] *Id.* Ex. 8 at 1; *id.* Ex. 5 at 10.

- SA Hamblet reviewed the "Short Sale Recommendation" memorandum Adam Greenwood prepared. This memorandum set out detailed reasons why Greenwood felt it was in Homestreet's interests to accept a $1.1 million offer for the house, none of related in any way to the prior reinstatement payments.[72]

This evidence, which these agents reviewed five months before the Government sought forfeiture of Catherine's funds, unequivocally demonstrates that the 2013 transaction was negotiated entirely through Homestreet representatives on the seller's side, with no involvement whatsoever by Abney, no reference whatsoever to the prior payments, and admonitions that the negotiation was to be conducted on an arm's-length basis with terms no different than those that would be offered to any other potential buyer.[73] Neither these materials, nor any of the information contained within them, were disclosed to the issuing magistrate.

SA Smith's affidavit was also materially false and misleading regarding the August 24, 2011 loan that was allegedly obtained from D.M. and used to make a reinstatement payment on the Wilsonville home. In his affidavit, SA Smith states that "investor D.M. loaned R. STOVER $100,000 which was to be repaid in 90 days."[74] The actual evidence available to SA Smith, however, clearly shows that D.M. did *not* lend money to Ron Stover, but rather to Capital Funding Investments, LLC, which is listed as the "Maker" in the Promissory Note executed by D.M.[75] Additionally, Section 13 of the Promissory Note, called "Waiver of Conflict of Interest," makes it clear that John Shadek, not Ron Stover, was the principal of the "Maker," and that he was also counsel to D.M.[76]

---

[72] *See id.* Ex. 8 at 2; *id.* Ex. 6.

[73] *See, e.g. id.* Ex. 5 at 31-32.

[74] C. Stover Decl., Ex. 6 at 12.

[75] *See* Sali Decl., Ex. 10.

SA Smith's affidavit also states that "[i]n an interview with D.M., he stated that he was told the money was to be used for business purposes with Xtreme Iron."[77] While SA Smith did not say specifically that it was Ronald Stover who told D.M. how the proceeds of his loan were to be used, the context he presented the statement in would naturally lead to this inference.

The memorandum of D.M.'s interview tells a different story. According to that memorandum, D.M. was "a client of JOHN SHADEK's, and they had been involved in a variety of business and personal matters. As a result, when SHADEK asked him to provide an unsecured 30 day loan, … he agreed to do so as a favor to SHADEK, who had specifically asked for his help."[78]

Had the issuing magistrate been presented with the accurate and complete information available to SA Smith, the seizure warrant would not have been issued. The misleading nature of the Smith affidavit is apparent from the evidence already before this Court. To the extent that the Stovers are required to make a formal request for a *Franks* hearing,[79] or the equivalent thereof in this context, they expressly do so here, and request the opportunity to examine SA

[76] *Id*. at 4.

[77] C. Stover Decl., Ex. 6 at 12.

[78] Sali Decl., Ex. 11 at 1.

[79] *See Franks v. Delaware*, 438 U.S. 154 (1978) (providing for, upon proper showings, evidentiary hearings as to false statements in affidavits).

Smith as to the veracity and completeness of his affidavit and his knowledge of omitted information. The requirements for such a hearing have been more than established.[80]

IV. PROCEDURAL ISSUES

The discussion and evidence above establish that:

- The Government's description of the underlying facts is fundamentally wrong in several material, critical respects, as is readily demonstrated by uncontradicted evidence;
- There is no valid basis for forfeitability *even under the Government's erroneous view of the facts*—and this conclusion is still more obvious when the facts are viewed correctly; and
- The warrant purporting to authorize the seizure of Catherine Stover's funds was invalid on multiple grounds.

Accordingly, the inescapable conclusion is that the Government has no valid claim of right to the funds it seized from Catherine Stover. As stated above, the only remaining question is *when* this inevitable determination will be made. Under the well-established law of this circuit, Ms. Stover is entitled to have it made now.

---

[80] *See, e.g.*, *United States v. Stanert*, 762 F.2d 775, 780-81 (9th Cir. 1985) ("[T]he Fourth Amendment mandates that a defendant be permitted to challenge a warrant affidavit valid on its face when it contains deliberate or reckless omission of facts that tend to mislead."); *id.* at 781 ("Clear proof of deliberate or reckless omission is not required. Such proof is reserved for the evidentiary hearing. At this stage, all that is required is that the defendant make a substantial showing that the affiant intentionally or recklessly omitted facts required to prevent technically true statements in the affidavit from being misleading.").

A. Under the Established Law of This Circuit, Catherine Stover Has a Due Process Right to a Hearing at This Time.

As set forth in the Motion, Catherine Stover has a due process right to a prompt hearing on the Government's continued right to possession of her funds, notwithstanding the statutory regime purportedly forcing her to await the conclusion of her husband's criminal case. That right is clearly set forth in *United States v. Crozier*.[81] Because the Government disputes *Crozier*'s applicability here, it is worth highlighting the pertinent facts set forth in the Ninth Circuit's opinion.

In *Crozier*, the third-party claimant—the equivalent of Catherine Stover in this case—was a Ms. Wolke, who lived with defendant Crozier.[82] The district court had granted a restraining order under 21 U.S.C. § 853.[83] As it does today, that statute provided that a third-party claimant such as Ms. Wolke could not intervene in the case and had to await the conclusion of the criminal proceeding before there could be any adjudication of her right to the property.[84]

The Government argued there, as it does here, that the statutory procedure was the exclusive vehicle for adjudicating third-party interests and that Ms. Wolke simply had to wait. The Ninth Circuit acknowledged that this was the result under the statute, but unequivocally held that this result did not comport with due process:

---

[81] 777 F.2d 1376 (9th Cir. 1985).

[82] Ms. Wolke was herself charged in certain counts, but not with any counts that would have supported forfeiture under the Government's theory. Accordingly, for all purposes relevant to the forfeiture issues, she was a third-party claimant, and the Ninth Circuit treated her as such. *See id.* at 1382-84.

[83] *Id.* at 1382-83. When the order was initially issued it was without express statutory authority. However, an intervening statutory change expressly provided for such orders, and the court held that the new procedure could constitutionally be applied in Ms. Wolke's case. *See id.*

[84] *See id.* 1383 ("Under the new Act, third parties who are not charged with an offense for which forfeiture is a penalty must await the conviction or acquittal of the defendant before they file proceedings to protect their interest in the forfeited property.").

> Wolke next asserts that the Act violates her Fifth Amendment right to due process of law and that it is unconstitutional on its face because Congress failed to provide for a hearing on a restraining order before trial or conviction.
>
> We agree. . . .
>
> Because Wolke and Crozier had significant property interests in the real and personal property seized by the government, due process requires that they be afforded the opportunity to be heard at a meaningful time and in a meaningful manner. The statutory forfeiture provisions do not satisfy due process. We believe that the absence of any hearing on the imposition of a restraining order on a defendant's property, or a hearing for parties with a third party interest which takes place months or years after a restraining order is issued, cannot be construed as a hearing provided "at a meaningful time." The risk of an erroneous deprivation under these procedures is high.
>
> Under the Act's forfeiture provisions, neither the defendant nor a third party may challenge a restraining order unless and until the defendant is convicted. This case was filed more than five years ago, and the defendant's trial and appeals may take several years more. If the defendant is acquitted, the validity of the restraining order is moot and parties with an interest in the property may have no remedy for the lengthy and wrongful deprivation of their property.
>
> We hold that the forfeiture provisions of the Comprehensive Crime Control Act do not comply with the due process requirements of the Fifth Amendment to the United States Constitution. More specifically, we find 21 U.S.C. § 853(e)' s provisions for restraining orders or injunctions on the filing of an indictment, and the hearing provisions in 21 U.S.C. § 853(n) for those with third party interests, do not protect the rights of defendants and third parties.[85]

Especially in light of the Government's arguments in the present case, what is *absent* from the *Crozier* opinion is just as important as what is present. The Ninth Circuit did not identify any extreme facts, special hardships, or other unique circumstances. Indeed, the only

[85] *Id.* at 1383-84 (citations and internal quotation marks omitted).

fact noted with respect to Ms. Wolke was that there was an order restraining her from transferring or encumbering "some property belonging to [her]."[86]

Based on this fact alone, the court concluded that a hearing taking place "months or years" after the restraining order had been issued would not satisfy due process.[87] Because due process mandated a prompt hearing and no rule or statute provided for a proceeding that would satisfy the constitutional requirement, the court found the statutory scheme unconstitutional on its face and required the district court to hold a hearing according to the provisions set forth in Rule 65 of the Federal Rules of Civil Procedure.[88]

B. The Government's Attempted Reliance on *United States v. Lazarenko* Is Unavailing.

Crozier remains the law of this Circuit. It has not been called into question, and has been specifically reaffirmed in light of intervening Supreme Court precedent.[89] The Government attempts to avoid *Crozier*'s dictate by relying on *United States v. Lazarenko*.[90] But *Lazarenko* arose in a completely different factual and procedural posture, and virtually every relevant aspect of that case is fundamentally different from its counterpart in the present one.

The most obvious difference is timing. *Crozier* is about a third-party claimant's right to demand a prompt hearing on the restraint of her property, instead of waiting for the conclusion of the criminal proceeding as the statutory scheme purports to require. The claimant in *Lazarenko* had no complaint on that issue because it was undisputed that *it was immediately about to get the*

---

[86] *Id.* at 1379.

[87] *Id.* at 1383-84.

[88] *See id.* at 1384 (noting "the absence of valid procedural guidelines" and imposing this requirement).

[89] *See United States v. Roth*, 912 F.2d 1131, 1132-33 (9th Cir. 1990).

[90] 476 F.3d 642 (9th Cir. 2006).

very hearing it claimed to have wanted—a hearing on the issue of who had a right to the contested funds.

In *Lazarenko*, at the time the case was before the Ninth Circuit, the criminal defendant had already been convicted and sentenced, and the ancillary proceeding—the statutory prescribed proceeding for third-party claimants—was about to begin.[91] Accordingly, the claimant had little to complain about. Because it was immediately about to have the hearing it had asked for, it was reduced to arguing that the *past* delay was such an egregious violation that the funds should be released to it immediately, without any hearing.[92]

That request—not remotely like Catherine Stover's in this case—is what the court refused to grant. It "understood" that the ancillary proceedings in the trial court "w[ould] promptly commence,"[93] and "s[aw] no reason to delay those proceedings from going forward."[94] That determination has little bearing on the present motion, in which the very question at issue is whether Ms. Stover will get the hearing she wants—the hearing the *Lazarenko* claimant was about to get—or whether she will have to wait "months or years" for that determination, in violation of *Crozier*.

That alone would be sufficient to establish that *Lazarenko* does not save the Government here, but there are other fundamental distinctions between that case and Ms. Stover's. In particular, the claimants were situated very differently.

---

[91] *See id.* at 647.

[92] *See id.* at 648.

[93] *Id.* at 650.

[94] *Id.* at 651.

There was no individual claimant involved in *Lazarenko*. The entity claiming an interest in the funds was a receiver that had been appointed by a foreign court to collect assets belonging to an Antiguan bank.[95] The government had assured the court that, if the funds were ultimately deemed to be the bank's, they would be returned with all interest that had accrued since the seizure.[96] (This—bearing interest—was, presumably, exactly what the funds would have been doing if they had been in the hands of the receiver or bank itself while ownership claims were being sorted out.) The corresponding lack of any cognizable harm to the receiver from having to wait for the hearing was expressly noted by the court in its analysis.[97]

The same is not true here. Catherine Stover is not a corporate entity appointed to gather the assets of an offshore bank. She is an individual human being who has had virtually all of her assets taken away from her.[98] This would be bad enough under any circumstances, but is particularly so here given that the deprivation happened at her time of greatest need, when her husband is under indictment and she wishes to use her assets to help him however she can.[99]

---

[95] *See id.* at 645.

[96] *See id.* at 650.

[97] *See id.* at 651 (noting the lack of any "particularized injury").

[98] *See* Supp. Decl. of Catherine Stover in Supp. of Jeffrey Stover's and Catherine Stover's Mot. for Return of Property ("Supp. C. Stover Decl.").

[99] Ms. Stover's interest in her marital relationship, and in seeking to assist her husband—out of her desire to help him, and her interest in maintaining their family's security and stability—is of independent constitutional significance. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2593-94 (2015) (discussing "the transcendent importance of marriage"); *id.* at 2599-2600 ("Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."); *id.* at 2600 ("Marriage also affords the permanency and stability important to children's best interests.").

Accordingly, because every material aspect of *Lazarenko* is completely different from that in the present case, *Lazarenko* is not the proper case for this analysis.

C. This Case Is Squarely Governed by *Crozier*.

Crozier, by contrast, is. There is no legally relevant distinction between this case and *Crozier*—and in fact, to the extent there are any differences at all, they make Ms. Stover's case stronger than Ms. Wolke's.

As to the timing of the deprivation, the Government attempts to minimize the time that Ms. Stover has been deprived of her funds, arguing that (as of the time of the Government's Response) the seizure warrant had been issued "just 8 months ago."[100]

But the relevant time period is not the time between the seizure warrant and the time the Government filed its Response. The relevant period is, instead, the period from the seizure of the funds to the time at which Ms. Stover will get them back through the statutorily prescribed procedure, if she is forced to follow that procedure.

Under the most optimistic view of things, that could under no circumstances be sooner than mid-2018, two years from the date of the seizure. And that time frame is far from guaranteed. Although this Court and the parties will no doubt work diligently to take the underlying criminal case to trial, no one knows what may happen along the way, particularly given the unusual degree of complexity in that case. Depending on the result of that case, Ms. Stover may need to wait further for the appellate process.

Such factors, and the resulting uncertainty, were specifically noted by the Ninth Circuit in *Crozier* in requiring that the statutory procedure be bypassed and that the claimant be given a prompt hearing.[101] By contrast, in *Lazarenko* there was neither uncertainty nor anticipated delay. The defendant had been tried and sentenced, and it was undisputed that the hearing on the claimant's right to the property was about to begin immediately.

---

[100] Resp. at 18.

Accordingly, *Crozier*'s holding—that in this procedural context a projected delay of "months or years . . . cannot be construed as a hearing provided 'at a meaningful time'"[102]—applies with full force to Ms. Stover's situation.

This is even clearer when the particular prejudice to Ms. Stover is considered. In determining the harm suffered by someone whose life preserver has been taken away, the specific number of days it is withheld is less important than whether the person happens to be drowning at the time. Ms. Stover needs her funds now, for specific, identified purposes.[103] Unlike the receivership entity in *Lazarenko*, she will not be made whole by having her funds returned to her with interest sometime in the future, after her family's crisis has passed.[104]

This principle—that what matters is not only the length of time in the abstract, but the prejudice caused by the delay in light of the particular factual context—is well-established in constitutional law. In the speedy trial context, for example, "the length of delay that will provoke [the speedy trial] inquiry is necessarily dependent upon the peculiar circumstances of the case"; accordingly, a longer delay with no specific prejudice can be constitutionally permissible, while a shorter delay with identifiable prejudice may violate the Sixth Amendment.[105]

---

[101] *See Crozier*, 777 F.2d at 1384 ("[T]he defendant's trial and appeals may take several years more.").

[102] *Id.* at 1383-84 (quoting *Armstrong v. Manzo*, 380 U.S. 545 (1965)).

[103] *See* Suppl. C. Stover Decl. ¶¶ 6-7.

[104] This principle does not rest on Jeffrey Stover's Sixth Amendment rights or on Ms. Stover's ability to assert those rights on his behalf. Both will be addressed separately if necessary. The reference to Ms. Stover's specific, identifiable, immediate need for her funds is included to contrast this case from *Lazarenko*, in which the entity claimant would have suffered no harm if its funds had ultimately been returned to it with interest.

So too, here, Ms. Stover's particular circumstances weigh heavily in favor of finding the projected delay impermissible—in contrast to the claimant in *Lazarenko*, who under the circumstances would have suffered no harm from the delay, and who in any event was imminently about to enjoy the very proceeding which Ms. Stover requests here. Notably, even in *Crozier* there was no suggestion that Ms. Wolke had any particular need for her funds, such that if anything Ms. Stover's claim to a prompt hearing is stronger than Ms. Wolke's was.

In sum, *Crozier* and *Lazarenko* can be read together as follows:

- In general, the statutory procedures for third-party claimants "do not comply with the due process requirements of the Fifth Amendment to the United States Constitution."[106] A claimant who has had "some property" seized, and who would otherwise have to wait "months or years" for a determination as to her right to the return of that property, is constitutionally entitled to a prompt hearing on that issue notwithstanding any purported statutory directive to the contrary.[107] Because *Crozier* was the first Ninth Circuit case on this issue, and because it relied on no special or extraordinary facts in reaching its holding, this is the default rule.

[105] *Barker v. Wingo*, 407 U.S. 514, 530-31 (1992).

[106] *Crozier*, 777 F.2d at 1384.

[107] *Id.* at 1379, 1383.

- Where special circumstances are present affirmatively making it clear that the claimant has suffered no harm from any past delay, and the requested hearing is imminently about to take place, the past delay, up to a certain point, is not a sufficient violation to justify "defaulting" the Government and mandating the return of the property *without* a hearing.[108]

Catherine Stover's situation is functionally identical to Ms. Wolke's, and not remotely similar to that of the receiver in *Lazarenko*. This case is governed by *Crozier*.

D. The Government's Other Attempts to Distinguish *Crozier* Are Similarly Without Merit.

1. The Distinction Between a Restraining Order and a Seizure Warrant Is Legally Irrelevant for Purposes of This Motion.

The Government argues that *Crozier* does not apply here because that case "specifically dealt with restraining orders under § 853(e), not seizure warrants, like the one at hand, which are issued under § 853(f)."[109]

But that is a meaningless distinction. As the Ninth Circuit saw it, the procedure in *Crozier* was defective, not in name, but in operation and effect. That procedure caused a third-party claimant to be deprived of her funds for an indeterminate period of time without an opportunity for a prompt hearing. If that violates the due process requirement—as the Ninth Circuit held that it does—the result is the same regardless of whether the Government achieves it through that statutory procedure or a different one such as that governing seizure warrants. The warrant procedure provides no additional protections, beyond those present in the restraining

[108] *See generally Lazarenko*, 476 F.3d 642.

[109] Resp. at 17.

order context, that bring that procedure back within due process boundaries. Indeed, as discussed above, if anything the warrant route is even *less* protective of the claimant's rights.

The Government's further point—that "[b]ecause *Crozier* dealt with restraining orders, the *Crozier* remedy, using the procedure in Federal Rule of Civil Procedure 65, is not available here"[110]—not only misapprehends *Crozier*'s procedural analysis, but turns the entire reasoning of that case on its head. The Ninth Circuit in *Crozier* directed the district court to use the Rule 65 procedure, not because that was statutorily prescribed, but because there *was* no procedure within the applicable framework that satisfied due process requirements.[111]

When the problem is that the statutory framework is constitutionally deficient, it is no answer to say that there is no remedy because the statutory framework does not provide for one. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[112] The Ninth Circuit followed this rule in *Crozier*, and directed the use of a procedure that would protect Ms. Wolke's due process rights. That is what Ms. Stover requests here.

2. There Is No Need for the Government's Proposed Rebalancing (Which Would, in Any Case, Favor Ms. Stover).

The Government correctly points out that the Ninth Circuit's due process analysis in this context follows a balancing test: "To determine what process is due, we must balance the risk of an erroneous deprivation, the state's interest in providing specific procedures and the strength of an individual's interest."[113] What the Government fails to acknowledge is that the Ninth Circuit has already conducted this analysis in this precise context, and has rejected the Government's position.

---

[110] *Id.*

[111] *Crozier*, 777 F.2d at 1381 ("*In the absence of valid procedural guidelines*, we again hold that Rule 65 of the Federal Rules of Civil Procedure governs the restraining order . . . .") (emphasis added).

[112] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted in original)).

Immediately after the quote above, the court in *Crozier* proceeded to say that "[t]he statutory forfeiture provisions do not satisfy due process."[114] As noted above, this was not based on any extraordinary facts present in that case, but on the bare facts that someone had had "some property" taken away with no opportunity to contest that taking for "months or years." Those facts, without more, led to the conclusion that the statutory framework was facially unconstitutional and violated the claimant's due process rights.

The factors that the Government wishes this Court to balance—for example, the Government's claim that "[t]he United States and Congress have a strong interest in following the specific procedures governing the adjudication of third party interests in seized assets subject to forfeiture"[115]—were all present in *Crozier*. Also in *Crozier*, there were disputes that had to be resolved over whether the property was in fact forfeitable; the Government had obtained a restraining order on the theory that it was, and Ms. Wolke contended that it was not. The Ninth Circuit obviously considered all of those factors *en route* to its ultimate determination that the statutory procedure was facially unconstitutional.

The same is true with respect to the Government's bare assertion that "[t]o now adjudicate only Catherine Stover's interest in the property risks cutting out other potential claimants and violating their property and due process rights."[116] As an initial matter, there is no factual support whatsoever for the Government's purported concern. The Government has not identified any other third party who could even theoretically have an interest in the property at issue, and given the evidentiary record described above it is clear that there could be none. Additionally, there is no legal basis for the Government's suggestion that such a claimant, were he or she to exist, would have a "due process" right to keep Catherine Stover's assets frozen where he or she has not even surfaced, much less asserted any formal claim. Regardless, all of these possibilities were present in *Crozier* to at least the same extent they are present here, and the Ninth Circuit obviously considered them insufficient to change its opinion.

---

[113] Resp. at 19 (quoting *Crozier*, 777 F.2d at 1383).

[114] *Crozier*, 777 F.2d at 1383.

[115] Resp. at 24.

Indeed, *Crozier* did not leave open *any* room for interpretation in light of the specific facts of a particular case (at least in this procedural posture, unlike the significantly different one at issue in *Lazarenko*). The Ninth Circuit's language was broad and categorical. It held the procedural framework invalid on its face and did not purport to rest on any particular case-specific facts:

> Wolke next asserts that the Act violates her Fifth Amendment right to due process of law and that it is unconstitutional *on its face* because Congress failed to provide for a hearing on a restraining order before trial or conviction.
>
> We agree. . . .
>
> . . . *The statutory forfeiture provisions do not satisfy due process*. We believe that the absence of any hearing on the imposition of a restraining order on a defendant's property, or a hearing for parties with a third party interest which takes place months or years after a restraining order is issued, cannot be construed as a hearing provided "at a meaningful time." . . .
>
> . . . .

[116] *Id*. at 15.

> We hold that the forfeiture provisions of the Comprehensive Crime Control Act do not comply with the due process requirements of the Fifth Amendment to the United States Constitution. More specifically, we find 21 U.S.C. § 853(e)' s provisions for restraining orders or injunctions on the filing of an indictment, and the hearing provisions in 21 U.S.C. § 853(n) for those with third party interests, do not protect the rights of defendants and third parties.[117]

And even if *Crozier* had left open the possibility of case-specific rebalancing—which, again, it did not—nothing about this case would push the balance in the Government's direction. As set forth above, Ms. Stover's substantive right to the funds is clearly established, and indeed irrefutable; there is no conceivable interpretation of the evidence that would render the funds forfeitable under the Government's chosen theory or any other theory.

E. This Court Need Not Consider, at This Time, the Special Issues Associated with Mr. Stover's Sixth Amendment Rights.

As set forth in the Motion, Jeffrey Stover's Sixth Amendment right to be represented by the counsel of his choice, and Ms. Stover's interest in assisting him to do so, constitute independent bases for the granting of this motion. As agreed and permitted on the record at the April 10, 2017 hearing in this case, that issue is being reserved at the present time. The Stovers believe that Catherine Stover is entitled to the return of her funds based on the grounds set forth above—the lack of any substantive grounds for forfeitability, and her due process right to a prompt hearing—without going further and considering Jeffrey Stover's Sixth Amendment rights.

Should this Court conclude that these grounds are not dispositive, the Stovers are prepared to make the required showing. Jeffrey Stover's undersigned counsel represents that he expects to be able to prove, by reference to the Stovers' financial circumstances and the expected

[117] *Id.* at 1383-84 (emphasis added; citations and internal quotation marks omitted).

cost of defending this case, that the return of the funds will make a constitutionally relevant difference for Sixth Amendment purposes.

V. CONCLUSION

The Government points out that a criminal defendant "has no Sixth Amendment right to spend another person's money for legal fees."[118] But the converse is also true. The Government has no right to retain another person's money to which it has no lawful claim.

As discussed above and in the Motion, the seized E-Trade funds were not, and are not, subject to forfeiture under the theory chosen by the Government (or, for that matter, any other theory).

The only remaining issue relates to *when* that inevitable substantive determination—that the funds are not subject to forfeiture—will be made. The Government wants that decision postponed until after Jeffrey Stover's trial; the Stovers want it to be made now, so that (among other reasons) Ms. Stover's funds can be used to support her husband during this critical time.

The law on this point is clear. Catherine Stover has a right, established under Ninth Circuit law, to a hearing at this time. The evidence necessary for the required determination is already before this Court, and will be supplemented at the hearing on this motion. Undersigned counsel respectfully submit that the law and evidence require the return of Ms. Stover's funds.

---

[118] Resp. at 9 (quoting *Kaley v. United States*, 134 S. Ct. 1090 (2014) (internal quotation marks omitted).

For the foregoing reasons, undersigned counsel respectfully request that this Motion be granted.

DATED: April 26, 2017

KEVIN SALI LLC

By: s/ *Kevin Sali*
KEVIN SALI, OSB No. 044065
kevin@salilaw.com
Tel.: (503) 329-3598
Fax: (503) 765-5377
Attorney for Defendant Jeffrey Stover

JOHN HENRY HINGSON III, P.C.

By: s/ *John Henry Hingson*
JOHN HENRY HINGSON III, OSB No. 710821
johnh@hingson.com
Tel.: (503) 656-0355
Fax: (503) 656-0415
Attorney for Catherine Stover